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Self-Represented Litigants and the New Normal in Family Court

BY THE HON. GREGORY G. GORDON,
EIGHTH JUDICIAL DISTRICT COURT, FAMILY DIVISION

One of the most significant changes to our court system in recent years is the increasing number of self-represented litigants. The trend is alarming in family court where the percentage of contested domestic relations cases that involves at least one pro se litigant exceeds 85 percent.[1] This new normal poses many challenges for judges tasked with ensuring the self-represented obtain fair access to justice.

Litigants acting without counsel have difficulty drafting proper pleadings, meeting procedural requirements, articulating their positions, and in general navigating or even understanding the process. This article will provide a brief overview of the legal, practical, and ethical challenges that judges face in handling self-represented litigants in the courtroom.

Is the shift a problem?

The choice not to retain an attorney is most often not a choice at all. Hiring an attorney is often not an available option for economic or social reasons. Despite efforts to make our courts accessible, the legal process is confusing and, in many respects, counterintuitive. Self-represented litigants encounter an inherent language barrier, often not understanding the words used in the courtroom by the judge or staff. Court filings can be complex and cumbersome, and the process is not always user-friendly. Clerks are hesitant to answer questions for fear the assistance will be construed as legal advice or violating the clerk's need for neutrality. Self-represented litigants face challenges preparing orders after hearings or completing steps to avoid unwanted dismissal. Language issues, disabilities, etc. are also challenges preventing access to justice.

Can judges improve access without compromising neutrality?

Our adversary court system contemplates the judge taking a passive role, with attorneys for both

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sides responsible for framing the issues, presenting the evidence, etc. Now, judges are finding themselves in a position of needing to take a more active role. However, this circumstance leads to the challenge of how to maintain neutrality when needing to assist self-represented litigants present their cases.

Should judges take a more active role?

In order to preserve public confidence in our courts, judges must deliver a fair process. To decide cases fairly, judges require information and evidence. However, what happens when a self-represented litigant cannot marshal that evidence without assistance? Without a full development and understanding of the facts of a case, judges are at risk of misapplying the law. The stakes are especially high when a child's welfare is at issue. A judge who takes a passive role in handling cases with self-represented litigants, or who is expecting proper compliance with procedural requirements, can encounter serious decision-making challenges. As one California Court of Appeals Court noted: "In such a hearing, the judge cannot rely on the [propria persona] litigants to know each of the procedural steps, to raise objections, to ask all the relevant questions of witnesses, and to otherwise protect their due process rights."[2]

> **Our courts must evolve with the changing landscape, which means adapting to the new normal in which the majority of litigants in family court are unrepresented.**

What Is ethical?

The Nevada Code of Judicial Conduct provides some guidance to judges on the balance between judicial neutrality and the judge's obligation to guarantee every person "a right to be heard." The dockets in both Clark and Washoe counties are burgeoning; efficiency is essential to keep up with the caseload demands, but not at the cost of disposing of cases fairly and with patience.

Rule 2.6 requires a judge "to accord every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."

Rule 2.2 requires the judge to "perform all duties of judicial office fairly and impartially."

Commentary to Rule 2.2 states: "It is not a violation of this Rule for a judge to make reasonable accommodations to ensure self-represented litigants the opportunity to have their matters fairly heard." This comment appears to explicitly endorse judges taking a more active role when hearing cases involving pro se litigants.

The Nevada Supreme Court has stated "in general, the rules of civil procedure 'cannot be applied differently merely because a party not learned in the law is acting pro se.' While district courts should assist pro se litigants as much as reasonably possible, a pro se litigant cannot use his alleged ignorance as a shield to protect him from the consequences of failing to comply with basic procedural requirements."[3]

Judges must also be mindful of two important principles when dealing with self-represented litigants. First, the strong policy interest in favor of deciding cases on the merits rather than default. Second is the notion that our legal system should embody "the orderly ascertainment of the truth" and not just a contest to see who has the cleverest lawyer.

What can judges do?

Recognizing the trial judge's need for facts and evidence – what allowances can a judge make within the bounds of the law to permit a pro se litigant to be heard and the case to be properly presented for decision?

Listed below are just a few of the accommodations judges have made (that appellate courts in other jurisdictions have specifically approved) to assist self-represented litigants:

- Liberally construing documents filed;
- Allowing liberal opportunity to amend;
- Explaining the legal elements required to obtain relief or the legal standard at issue;
- Explaining how to introduce evidence;
- Explaining how to object to the introduction of evidence;
- Explaining the right to cross-examine witnesses;
- Calling witnesses and asking questions of them;
- Preparing jury instructions for a self-represented litigant or requiring opposing counsel to do so;
- Assisting the parties to settle the case;
- Granting continuances to accommodate unprepared litigants;
- Explaining court processes such as service of process and how to issue subpoenas; and
- Drafting orders.

Where do we go from here?

Our courts must evolve with the changing landscape, which means adapting to the new normal in which the majority of litigants in family court are unrepresented. The court's ability to dispense justice efficiently and fairly in these cases is challenging and a subject that requires further dialogue and exploration.

One possible reform would be to implement an "informal trial program" for divorce and child custody cases similar to programs already in use in Alaska, Arizona, Idaho, Oregon, Utah, and Washington. The rules of evidence are relaxed, the number of witnesses limited, judges ask the questions, and each side presents their case without interruption or objection. States that have implemented informal trials are reporting success in reducing conflict, expediting cases to resolution, and improving overall satisfaction and confidence in the process. The reality is that many self-represented litigant trials are handled in this manner already out of necessity due to the participant's lack of understanding of the rules and inability to comply with them. It makes sense to adopt rules formalizing and sanctioning what judges already are experiencing in the courtroom.

For the time being, each judge is left to find their own communication style and comfort level with how to balance rules with realities – with the goal of ensuring sound, evidence-based decision-making and delivering a result that achieves substantive and procedural fairness.

JUDGE GREGORY G. GORDON presides in Department C of the Eighth Judicial District Court, Family Division. He received his J.D. from Pepperdine School of Law in 1994 and was on the editorial board of the Pepperdine Law Review. For 29 years, he was in private practice in Clark County, handling complex family law cases and received his AV rating from Martindale-Hubbell. Judge Gordon has authored numerous articles on family law subjects, ranging from property and contractual rights of cohabitants, advocacy for children, and the intricacies of valuing business interests in divorce cases. He co-authored the first print edition of "Nevada Child Custody and Visitation," which appears in the Nevada Family Law Practice Manual. While in law school, he published "Adult Survivors of Childhood Sexual Abuse and the Statute of Limitations: The Need for Consistent Application of the Delayed Discovery Rule," which appeared in the Pepperdine Law Review Journal, 20 Pepp. L. Rev. 1359 (1993).

ENDNOTES:

1. There are no official statistics available. An informal survey of hearings conducted in domestic relations matters over the past two-year period suggests 70 percent of cases involved two self-represented litigants; 17 percent of cases involved at least one self-represented litigant; and in approximately 13 percent of cases both sides were represented by counsel.
2. *Ross v. Figueroa*, 139 Cal.App.4th 856, 861 (2006).
3. *Rodriguez v. Fiesta Palms, LLC,* 134 Nev. 654, 659, 428 P.3d 255, 258-59 (2018) (quoting *Bonnell v. Lawrence,* 128 Nev. 394, 404, 282 P.3d 712, 718 (2012)).